No. 11844

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

PAUL W. SAMPSELL, as Trustee in Bankruptcy for the ESTATE OF C. A. REED FURNITURE COMPANY (a Corporation), Bankrupt,

Appellant,

vs.

CALIFORNIA BANK (a Corporation) and LAWRENCE WAREHOUSE COMPANY (a Corporation),

Defendants,

LAWRENCE WAREHOUSE COMPANY (a Corporation),

Appellee.

APPELLANT'S REPLY BRIEF.

CRAIG & WELLER,
McLAUGHLIN, McGINLEY & HANSON,
JAMES A. McLAUGHLIN,
650 South Spring Street, Los Angeles 14,
Attorneys for Appellant.

Parker & Company, Law Printers, Los Angeles. Phone TR. 5206.

TOPICAL INDEX

TABLE OF AUTHORITIES CITED

Cases

Statutes

TEXTBOOKS

No. 11844

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

PAUL W. SAMPSELL, as Trustee in Bankruptcy for the ESTATE OF C. A. REED FURNITURE COMPANY (a Corporation), Bankrupt,

Appellant,

vs.

CALIFORNIA BANK (a Corporation) and LAWRENCE WAREHOUSE COMPANY (a Corporation),

Defendants,

LAWRENCE WAREHOUSE COMPANY (a Corporation),

Appellee.

APPELLANT'S REPLY BRIEF.

The weakness of appellee's position is demonstrated by each of the following circumstances:

(1) Appellee fails to deal specifically with any of the authorities cited in appellant's brief.

(2) Apparently recognizing the force of appellant's authorities, appellee cites a few decisions which are either from other jurisdictions that follow a minority rule, or which contain dictum that has been repudiated by the applicable precedents in this state.

(3) Appellee seeks to obscure the California rule as to invalidity by citing cases from other jurisdictions where

the violation of a criminal statute was not even before the court.

(4) Appellee urges the size of the warehousing business and its apparent custom of noncompliance with these statutes as a reason for judicially repealing them. It does not demonstrate why the statutes could not have been complied with.

Appellee Does Not Sustain Its Claim of Repeal by Implication.

In Part I of Appellee's Brief, appellee argues that the Warehouse Receipts Act (Act 9059, General Laws*) superseded and therefore repealed the Civil Code sections by implication. To support this argument, appellee refers to certain requirements in the two statutes which are different.

"Difference" is a two-edged sword. It can just as easily be used as an argument that the later act was not intended to supersede the earlier, but that the two were to exist together and supplement each other. It is not *difference,* but *inconsistency* in the nature of *repugnance* that effects a repeal by implication.

Appellee has pointed out no such inconsistency between the two statutes. Even if appellee had found inconsistencies on other requirements, that would not repeal the consistent portions of the first legislation which were not dealt with in the later legislation.

Here both laws require that the warehouse receipt show the rate of storage charges. The Warehouse Receipts

---

*References to the General Laws and Codes shall mean those of California unless otherwise indicated.

Act provides no criminal penalty for violation of this provision, but section 1858f of the Civil Code does.

Appellant's argument, if sound, would likewise require the nullification of sections 578, 580 and 581 of the Penal Code. These sections impose heavy criminal penalties on warehousemen and others who issue false or misleading warehouse receipts.

Such an argument would also result in invalidity of section 3440.5 of the Civil Code, which provides:

> "Section 3440 of this code shall not apply to goods in a warehouse where a warehouse receipt has been issued therefor by a warehouseman as defined in the Warehouse Receipts Act, and a copy of such receipt is kept at the principal place of business of the warehouseman and at the warehouse in which said goods are stored. Such copy shall be open to inspection upon written order of the owner or lawful holder of such receipt."

It is important to note that this section was first enacted in 1939 while the case of *Heffron v. Bank of America (infra)* was pending and was amended in its present form in 1941, a year after the decision in the *Heffron* case. It is therefore clear that the state legislature did not at that late date regard it as necessary to embody all requirements as to valid warehouse receipt transactions in the Warehouse Receipts Act. That act expressly makes the provisions of section 3440 of the Civil Code applicable to pledges and transfers of warehouse receipts unless a copy of each such receipt is kept for inspection at the warehouse where the goods are stored.

If the legislature had construed the case of *Heffron v. Bank of America,* 113 F. (2d) 239, as meaning that all

legislation relating to the issuance or transfer of warehouse receipts must be in the Warehouse Receipts Act, it would have put that statute there, instead of in the Civil Code.

The only point the *Heffron* case decided was that section 3440 of the Civil Code, requiring the recordation of a seven-day notice of any transfer of a stock in trade, did not apply to a transfer of warehouse receipts evidencing such stock in trade. The Court correctly recognized the distinction between commercial paper such as warehouse receipts and the property represented thereby. The Court also noted that sections 37 to 43 of the Warehouse Receipts Act completely governed the procedure for transferring such receipts and defined the rights acquired in such transfers. The Court had no other alternative than to hold that provisions of another statute repugnant to such sections were repealed by implication, if and to the extent that they affected the transfer of property evidenced by warehouse receipts.

Just as the provisions of section 3440.5 of the Civil Code now operate concurrently with the Warehouse Receipts Act, so also do the provisions of sections 1858b and 1858f remain effective in that they superimpose upon the requirement of both laws a criminal penalty for violation of the requirement that the receipt disclose its rate of storage charges.

Further evidence of the legislative intent to have several different laws operate concurrently is that sections 1231 to 1258 of the Agricultural Code (enacted in 1933) set forth detailed requirements as to the warehousing of agricultural products. These sections impose requirements as to the contents of such warehouse receipts not contained in the Warehouse Receipts Act, yet it was clearly

not the legislative intent to repeal the provisions of the Warehouse Receipts Act which were not repugnant to these sections.

The authorities that govern this question are set forth on pages 19 and 20 of Appellant's Opening Brief. The rule is admirably stated in 23 California Jurisprudence* (Statutes), section 85, at page 698, as follows:

> "Whenever there is an irreconcilable conflict or repugnancy between the provisions of two acts, so that upon any reasonable construction they cannot stand together, the earlier act is repealed by the later one. without any repealing clause, an intention to repeal the prior statute being necessarily implied in such case. But, in view of the presumption against implied repeals, and the recognized duty of the courts to give effect, as far as possible, to all statutes not expressly repealed, it is settled that the inconsistency or repugnancy between the two must be irreconcilable and very clear in order than an implied repeal may be said to exist. Repugnancy between two acts in principle merely forms no reason why both may not stand."

The following brief comments will show the inapplicability of the authorities relied upon by appellee:

Commercial Nat. Bank v. Canal-Louisiana B. & T. Co., 239 U. S. 520, 60 L. Ed. 417, did not involve the repeal of any statutes by implication. It involved the question whether decisions prior to the adoption of the Uniform Warehouse Receipts Act should govern the transaction where they were contrary to the express provisions of

---

*This work was erroneously referred to in Appellant's Opening Brief as 22 California Jurisprudence, instead of Vol. 23.

that Act. The Court properly held that the Act governed where there was an inconsistency with any prior law.

Jewett v. City Transfer & Storage Co., 128 Cal. App. 556, involved the question whether sections 3051 and 3052 of the Civil Code conferring liens upon repairmen and governing the method of foreclosure applied so as to excuse a warehouseman from giving the notice of sale required by section 33 of the Warehouse Receipts Act. The Court first expressed a doubt as to whether those sections even applied to warehousemen. It then went on to say that they could not be relied upon to excuse compliance with the Warehouse Receipts Act. We do not contend that sections 1858b and 1858f excuse any compliance with the Warehouse Receipts Act. We do assert that there is nothing in that Act which excuses compliance with the two above mentioned Civil Code sections.

Neither *Salt River Valley Water Users Ass'n v. Peoria Ginning Co.,* 231 Pac. 415 (Ariz.), nor *Mason v. Exporters & Traders Compress Co.,* 94 S. W. (2d) 758 (Tex.), embody any issue similar to or useful in this case. Their selection may evidence the desperateness of appellee's position.

Equitable Trust Co. v. A. C. White Lumber Co., 41 F. (2d) 60 (D. C., Idaho, 1930), has been dealt with in our opening brief. It should be noted that this case wholly nullifies the effect of statutes requiring the storage rates to be shown on the face of the receipt. It says the failure to abide by such statutes in no way effects the negotiability or validity of the receipt. If this is true, what may be

the purpose of retaining such statutes on the books? That Court fell into the error of following some scattered decisions where it was the warehouseman that was seeking to take advantage of his own wrong by asserting the invalidity of the receipts which he had issued. Neither that case, nor any of the cases cited therein, involved a receipt issued or executed in violation of a criminal statute, so they could not be applicable to our case for any purpose.

The last statement likewise disposes of the other cases cited on pages 11, 12 and 13 of Appellee's Brief. Two of these cases, however, deserve further mention.

Woldson v. Davenport Mill & Elevator Co., 13 P. (2d) 478 (Wash., 1932), did involve a penal provision making it an offense to fail to state that the goods were owned by the warehouseman. When the receipts were issued the warehouseman did not own the goods, but it later acquired these receipts from the owner. The warehouse company was the one seeking to take advantage of this asserted defect, but the Court held that there was nothing in the statute requiring a validly issued negotiable receipt to be cancelled merely because the warehouse company had later acquired such receipt. The Court said there was no violation of the criminal statute.

Bank of California Nat. Ass'n v. Schmalz, 9 P. (2d) 112 (Ore., 1932), is another case where a warehouse company unsuccessfully tried to take advantage of its own failure to strictly comply with the law in failing to number the receipts consecutively. There was no criminal statute involved.

Appellee Cites No Applicable Authority to Sustain the Asserted Validity of the Receipts.

The cases cited by appellee are beneficial in that they bring into focus the fallacy on which it proceeds.

Appellee first cites *Eberhard v. Pacific Southwest L. & M. Corp.,* 215 Cal. 226, where the Court said at page 228:

> "The inhibitions of the Corporate Securities Act (Deering's Gen. Laws, Supp. 1929, p. 3287, Act 3814) against sales of securities to the public without permits are meant to protect the public from imposition and deception—not primarily to benefit the seller. The seller and the purchaser are therefore in no sense *in pari delicto* where this provision is violated. The fact that the transaction may be void at the behest of the purchaser is not to allow a premium for real wrong done by the seller. The fundamental maxim that 'no one can take advantage of his own wrong' (sec. 3517, Civ. Code), and other kindred principles, immediately recur to the mind."

The parallel between the Corporate Securities Act and section 1858f of the Civil Code is exact. They both direct their prohibitions at and lay the penalties upon the issuer. If appellee were seeking to assert its own failure to comply with this statute as a basis for avoiding a liability under the receipts, the *Eberhard* decision would preclude this, but it does not preclude persons other than the issuer from asserting the invalidity.

The next case cited by appellee was decided prior to the Civil War. This is the case of *Harris v. Runnels,* 12 How. 79, 13 L. Ed. 901, in which the Court held that the violation of a statute requiring a certificate as to slaves brought into Mississippi did not preclude the seller from recovering the purchase price of such slaves.

In a similar but later case involving liquor instead of slaves, the Supreme Court in *Miller v. Ammon,* 145 U. S. 421, 36 L. Ed. 759, at 762, applied the rule which it has since followed, and which is directly contrary to the rule followed in the *Runnels* case.

The faint echo of the *Runnels* case which was voiced in a dictum in an early California case has been completely discredited by later decisions. In *Bentley v. Hurlburt,* 153 Cal. 796 (cited and relied upon by appellee), the question was whether the seller of lots could recover the unpaid balance of the purchase price when he had not complied with the statute forbidding the sale of lots referred to in an unrecorded subdivision map. The Court pointed out that there were two conflicting rules on the effect of illegality, citing *Berka v. Woodward,* 125 Cal. 119, as sustaining one rule, and *Harris v. Runnels (supra)* as authority for the contrary. It then said that it was unnecessary to select between these because the seller had in fact complied with the statute. Since then the case of *Berka v. Woodward* has become one of the leading and most frequently cited cases in this state on the effect of illegality. It is true that a few states such as Oregon and Montana have disapproved the doctrine of *Berka v. Woodward,* but it is definitely the law in California.

The case of *Uhlmann v. Kin Dow,* 193 Pac. 435 (Ore.) (cited by appellee), is an example of the minority rule that is followed in a few states as are also the cases of *Furlong v. Johnston,* 204 N. Y. Supp. 710, and *Adams Express Co. v. Darden,* 286 Fed. 61 (6th Cir.), also cited by appellee.

The Policy of the Statute Is Not Fulfilled by What Appellee Calls "Substantial Compliance."

The receipts do not even refer to other documents as containing the *rate* of storage charges. They do refer to these other documents for information as to the lien rights which the warehouseman claims. If such a receipt complies with the statute, then the effect of the statute is completely nullified. Instead of having the rate of charges shown on its *face,* the receipt would be sufficient as long as it told where information as to storage charges could be found. Obviously anyone going to the warehouse company's office and inspecting its books and records could always ascertain the rate of charges. Anyone knows that, without being so advised by the receipt. It is the policy of the law to render unnecessary such inquiries and investigations, by requiring the warehouse company to make such disclosure on the *face* of the receipt and not in some other instrument which the warehouse company may have.

The following comments will demonstrate the inapplicability of the cases cited by appellee under that subdivision in its brief:

In *Standard Bank of Canada v. Lowman,* 1 F. (2d) 935 (D. C., Wash., 1924), it was contended that the rights of the pledgee of warehouse receipts were invalid as against an innocent purchaser of the goods represented by such receipts, for the reason that the warehouse receipts did not comply with the statute governing their issuance. In answer to this, the Court said that warehouse receipts need not be in any particular form, but it then proceeded to state the essential statutory requirements, and in concluding this statement, it said that the evidence showed that the receipts substantially complied with all those requirements. There was no failure to comply with any of the

statutory requirements, the only question being whether one unit of fundible goods was equivalent to any other unit.

The case of *Boas v. De Puc Warehouse Co.*, 69 Cal. App. 246, did not involve the interpretation or effect of sections 1858b and 1858f of the Civil Code. That case is discussed and its doctrine disapproved in the case of *San Angelo Wine etc. Co. v. South End Warehouse Company*, 19 Cal. App. (2d) 749, wherein the Court said at page 751:

> "*Boas v. De Puc Warehouse Co.*, 69 Cal. App. 246, 250 (230 Pac. 980), presented the question whether, after the withdrawal of a part of a single bailment, a lien was retained on the residue for the entire amount of charges on the original quantity. In holding that the lien of the entire amount was retained, the court adopted a passage from 27 Ruling Case Law, page 1007, in which incidentally it was said that a warehouseman's lien is specific and not general. So far as any issue before the court was concerned, that statement was merely *dictum*. The language drawn from the volume cited was a statement of the common-law rule; and on page 1008 attention is directed to the fact that under the uniform warehouse acts the lien is extended to all such charges and claims as are enumerated in section 27 of our act, as amended in 1933."

The Court in the *San Angelo* case then went on to state that the liens of warehousemen were fully covered by sections 27 and 30 of the Warehouse Receipts Act.

It is clear from a reading of the *Boas* case that the existence or effect of sections 1858b and 1858f were never

brought to the attention of that Court, and to the extent that the decision can be regarded as a decision on anything, it seems to have been disapproved by the opinion in the *San Angelo* case.

None of the Minnesota decisions cited on page 22 of Appellee's Brief involved any criminal statute, and there is therefore no parallel between those cases and the case at bar.

On page 23, appellee cites four authorities to the effect that writings referred to in one contract shall be construed as part of that contract. This general rule is not applicable where the statute requires something to be set forth on the face of the receipt. A noteworthy example of a similar requirement is the requirement of Rule 223 of the Rules and Regulations of the Securities and Exchange Commission which requires, among other things, the issuer of exempt securities to include a paragraph on the first page of the prospectus to the effect that the securities have not been registered because they are believed exempt from such requirement. It could just as consistently be argued that such rule would be complied with by a reference on the first page of the prospectus to another instrument or document containing such statement.

Appellant does not controvert the rule that one contract may incorporate another by reference, but appellant does challenge appellee's claim that the statute requiring something to appear on the face of a document is complied with by having it appear in some other document.

There Is No Force to Appellee's Other Contentions.

Appellee seeks to dissipate the force of the rule as to invalidity by suggesting that the penal provisions of the Civil Code were aimed only at negotiable warehouse receipts, in spite of the plain language to the contrary.

Appellee also suggests that since the Act is not *malum in se* the receipts would not be void.

The contrary rule is stated in 6 Cal. Jur. (Contracts), page 105, as follows:

> "The general rule controlling in cases of this character is that, where a statute is passed for the protection of the public and not as a revenue measure, and it prohibits or attaches a penalty to the doing of an act, the act is illegal, and this, notwithstanding that the statute does not expressly pronounce it so. And a contract founded upon such an act is void. The statute is a prohibition of the law from entering into such a contract at all, and the illegality affects the whole transaction from its inception. And it is immaterial whether the thing forbidden is *malum in se* or merely *malum prohibitum*. Cases may be found holding a contrary doctrine; but an examination of those cases will, it has been said, show that the statutes upon which they are based generally do not prohibit, but merely impose a fine as an exclusive punishment. A statute of this character, prohibiting the making of contracts except in a certain manner, *ipso facto*, makes them void if made in any other way."

See additional authorities in Vol. 4, Ten-Year Supp. to Cal. Jur.

Conclusion.

The issue is not whether the Warehouse Receipts Act is being construed uniformly. It is why the uniform rule in this state as to invalidity of an illegal document should not apply.

The receipts being issued by appellee in violation of the criminal statute were void. They therefore conferred no rights upon the pledgee bank. (*Hollywood State Bank v. Wilde,* 70 Cal. App (2d) 103.) If appellee had held the merchandise covered by these receipts and interpleaded the pledgee bank and appellant, that pledgee could have established no rights as against appellant. This being true, appellee is liable for having delivered the merchandise to the wrong party.

Respectfully submitted,

CRAIG & WELLER,
McLAUGHLIN, McGINLEY & HANSON,
By JAMES A. McLAUGHLIN,
Attorneys for Appellant.